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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979
No. 79-759

PERINI NORTH RIVER ASSOCIATES and HARTFORD ACCIDENT AND INDEMNITY CO.,

Petitioners,

-v.-

RONALD FUSCO,

Respondent,

-and-

BERNARD SULLIVAN,

Respondent.

RESPONDENT RONALD FUSCO'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

EPSTEIN & EPSTEIN
Attorneys for Respondent Fusco
450 Seventh Avenue
New York, New York 10001
(212) 868-3050

Of Counsel:
BERNARD S. EPSTEIN

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COUNSEL PRESS, INC., 55 West 42nd Street, New York, N.Y. 10036 • (212) 391-6622

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POINT I

THE SECOND CIRCUIT HAS ACCURATELY DEFINED THE SPIRIT AND INTENT OF THE LANGUAGE CONTAINED IN 33 U.S.C. §902(3), AS APPLIED TO WORKERS WHO WOULD HAVE BEEN COVERED PRIOR TO THE ENACTMENT OF THE 1972 AMENDMENT.

At the outset, as succinctly stated by the Court below:

> "The phrase 'a person engaged in maritime employment' (hereinafter, sometimes called 'the critical phrase') is *not defined* in the 1972 amendments nor in the 1927 LHWCA which was being amended" Fusco v. Perini North River Assoc. 601 F.2d 659,663 (2nd Cir. 1979) (A8) (Emphasis Added)

While the bare text of the Statute, as amended, does focus primarily on certain enumerated occupations, it was clearly not the purpose of the amendment to exclude employees traditionally covered under the pre-amendment law. Instead, the only limitations on coverage contained in the Congressional Committee reports are those addressed to newly covered inland employees added by the Shoreward Extension of the

1972 Amendments: (NATIONAL MARINE TERMINAL CO. v. CAPUTO, hereinafter referred to as Caputo/Blundo, 432 U.S. 249,266).

> "Thus, employees whose responsibility is only to pick up stored cargo for further trans-shipment would not be covered, nor would purely clerical employees whose jobs do not require them to participate in the loading or unloading of cargo.******** Thus, an individual employed by a person none of whose employees work, in whole or in part, on navigable waters, is not covered even if injured on a pier adjoining navigable waters. S. Rep. 13; H.R. Rep.10-11"

The Circuit Court of Appeals in its unanimous decision in the case at bar construed the spirit and intent of the 1972 amendment as follows:

> "Congress took it for granted that injuries occurring upon water were covered and would remain covered. There was no indication that Congress considered withdrawing existing coverage or eligibility. What concerned Congress was injuries on land." Fusco v. Perini North River Assoc. p. 666 (A14) (supra).

In its interpretation of Congressional intent the Circuit Court was merely

following this Court's own definition of the application of the act to employees who would have been covered prior to the 1972 Amendments (Caputo/Blundo p.273) (supra) viz:

> "Both the text and the history demonstrate a desire to provide continuous coverage throughout their employment to these amphibious workers who, without the 1972 Amendments, would be covered only for part of their activity."

In CALBECK v. TRAVELERS INSURANCE COMPANY 370 U.S. 114, 117 (1962) this Court defined pre-amendment coverage as follows:

> "Our conclusion is that Congress invoked its constitutional power so as to provide compensation for all injuries sustained by employees on navigable waters whether or not a particular injury might also have been within the constitutional reach of a state workmen's compensation law."

In PETER v. ARRIEN 325 F.Supp. 1361, 1365 (1971) affirmed 463 F.2d 252 (Third Circuit) a pre-1972 case, the District

Court in determining which employees came within Section 2(3) of the Act, held as follows:

> "Section 3 of the Longshoremen's Act, 33 U.S.C. § 903 contains no reference to 'maritime employment'. Rather that language is contained in Section 2(4) of the Act, 33 U.S.C. § 902 (4) which defines an employer as 'an employer any of whose employees are employed in maritime employment in whole or in part, upon the navigable waters of the United States * * *'. The term 'maritime employment' is directed at the employer and not at the work that the employee is doing. Pennsylvania Railroad Co. v. O'Rourke, 344 U.S. 334, 73 S.Ct. 302, 97 L.Ed. 367 (1953)"

Respondents undoubtedly would have been covered employees prior to the enactment of the 1972 amendment and the amendment in no way withdrew such coverage.

POINT II

THERE IS NO REAL CONFLICT BETWEEN THE SECOND CIRCUIT'S INTERPRETATION OF "MARITIME EMPLOYMENT" AND THAT OF THE OTHER CIRCUIT COURTS.

In the case at bar, the Court of Appeals for the Second Circuit adopted

the following definition of maritime employment:

> "***we interpret the critical phrase 'person engaged in maritime employment' geographically so as to include any person whose principal duties are performed on navigable waters as that term was understood before 1972." Fusco v. Perini North River Assoc. p. 669 (A21) (supra).

The Circuit Court in explaining a definition of "maritime employment", which at first glance, appears to disregard the status requirement proscribed by this Court in Caputo/Blundo p.264,265 supra said:

> "Despite what is said in Weyerhauser Company v. Gilmore, at p.961, col. 1, the geographical interpretation of 'maritime employment' will not make superfluous the critical phrase in §2(3), 33 U.S.C. §902(3) and *will not leave the Act with no status test whatsoever*. Under such an interpretation, the 1972 Amendment will still operate, as Congress intended, to preclude compensation being paid to a *land-based employee* whose only claim to coverage is that he, while working for an employer who had an employee engaged in maritime employment, was

> injured on land *in an area adjoining navigable waters*." (Emphasis Added) Fusco v. Perini North River Assoc. p.669 (A20) (supra)

A close reading of Weyerhauser reveals that the Ninth Circuit did not deny coverage solely upon occupational as opposed to geographical grounds. As illustrated by the following portion of its opinion, that Court, at least in part, based its decision upon its reluctance to recognize a "log pond" as a navigable water viz:

> "The 'log pond' is a universal adjunct to a sawmill and is either: (1) an artificial lake or pond dug or banked in dry uplands and fed by well or imported water, or (2) a log boom or other type of partitioned area of a stream, bay or other self-supplying body of water. The 'log pond' of either type is maintained and used *solely* for the utilitarian flotation method of holding, sorting, handling, and ultimate guidance of saw logs to and upon subsurface chain conveyors which carry the saw log out of the log pond into the mill's sawing operation." (emphasis added) Weyerhouser Company v. Gilmore 528 F. 2d 957, 961

SEA-LAND SERVICE, INC. v. DIRECTOR, OFFICE OF WORKERS COMPENSATION PROGRAMS, 540 F. 2d 629,632 (3rd Cir.1976) cited by petitioner is readily distinguishable from the case at bar in that the claimant therein, "a shuttle driver, moving with a tractor rig trailer between Sea-Land's old terminal facility at Berth 52 and its new terminal at Berth 90" was clearly a land-based employee, injured on land in an area adjoining navigable waters and not a person whose principal duties were performed on navigable waters, as were the respondents herein.

A Ninth Circuit case cited by petitioners, BRADY-HAMILTON STEVEDORE CO. v. HERRON 568 F.2d 137,139, is similarly distinguishable from the instant case in that the claimant therein, a gear lockerman, employed by a stevedoring company in a gearlocker "located approximately

2600 feet north of the edge of the Columbia River", was also a land based employee and not a person whose *principal duties were performed on navigable waters.*

MAHER TERMINALS, INC. v. FARRELL 546 F.2d 476,478 a Third Circuit case cited by petitioners, involved a delivery clerk who worked in an office in a building adjoining a container shed situated about 2500 feet from the waters edge. In denying coverage under the Act, the Court reasoned as follows:

> "Farrell worked in an office. He did not work on the pier, in the yard, or on the dock as a checker (also referred to as a tallyman). ******** ******** He came within the congressional proscription of a purely clerical employee whose job did not require him to participate in the loading or unloading of cargo."

The Second Circuit was clearly not at odds with the Third nor would its decision in Maher have been otherwise when, in explaining the effect of its geographical

interpretation of "maritime employment", it said:

> "Under such an interpretation the 1972 Amendment will still operate, as Congress intended, to preclude compensation being paid to a land-based employee whose only claim to coverage is that he, while working for an employer who had an employee engaged in maritime employment, was injured on land in an area adjoining navigable waters." Fusco v. Perini North River Assoc. p. 669 (A20) (supra)

THIBODAUX v. ATLANTIC RICHFIELD CO. 580 F.2d 841, a Fifth Circuit case cited by petitioners, was distinguished by the Court below when it said:

> "In this case it is unneccessary for us to decide the eligibility of a person who performed merely incidental duties on navigable waters. Cf. Thibodaux v. Atlantic Richfield Co., supra, holding that the amended LHWCA does not apply to an employee who performs his duties on land but is injured during his transportation over navigable waters while journeying from one land duty to another land duty." Fusco v. Perini North River Assoc. p. 669 (A21) (supra)

STOCKMAN v. JOHN T. CLARK & SON OF BOSTON, 539 F.2d 264, a First Circuit case cited by petitioners also involved a land based worker, in an adjoining area added by the 1972 Amendment to the Act. The claimant therein was not an employee whose principal duties were performed over water, and who would have been covered prior to 1972.

CONTI v. NORFOLD & WESTERN RAILWAY CO. 566 F.2d 890,892, a Fourth Circuit case cited by petitioners, involved railroad employees unloading coal from hopper cars, in a railroad classification yard at Lamberts Point, on the Elizabeth River, in Norfolk, Virginia, the following "geographical" facts were related by the Court in denying coverage in that case:

> "None of the brakemen ever have occasion to go to Pier 6 or aboard a ship nor do they ever operate the dumper or loader. The deck foreman, certain clerical workers and motive power personnel are the only employees of the N&W who work on the pier or go aboard the ships."

Contrary to petitioners' claim of "irreconcilable conflict" (petitioners' brief, p.14), a true application of the Second Circuit's geographical interpretation of the critical phrase "person engaged in maritime employment", to the facts in each of the foregoing cases cited by petitioners, will reveal that the Second Circuit would invariably arrive at the similar results therein as did the other Circuits.

POINT III

THE SECOND CIRCUIT'S INTERPRETATION OF THE "CRITICAL PHRASE" ELIMINATES CONFUSION AND UNCERTAINTY IN THE BASIC ADMINISTRATION OF THE ACT.

The adoption of a geographical interpretation eliminates rather than fosters confusion and lack of certainty in the Act's application by including employees in addition to longshoremen, Harbor Workers, Ship Repairmen, Ship Builders

and Ship Breakers (33 U.S.C.A. 902 (3) and who otherwise might be left with no compensation remedy whatsoever. As the Court below said:

> "Unless the term a 'person engaged in maritime employment' be read geographically to include a person who while at work on navigable waters suffers a work-related injury, some persons employed on navigable waters will be left without any compensation remedy, state or federal. We have no data showing how large this group is in a period of increased exploration, excavation, drilling, and other enterprise on navigable waters."
> Fusco v. Perini North River Assoc. p. 668 (A18) (supra)

Petitioners have misconstrued the Second Circuit's Opinion in WALTER TANTZEN INC. v. SHAUGHNESSY 601 F2d 670, decided the same day as the case at bar. The claimant Shaughnessy in that case was not "clearly a longshoreman" as petitioners contend (Petitioners Brief p.18). He was a *scaleman,* employed by a company engaged in the business of weighing, sampling and

inspection of imported commodities. Moreover, as the Court below said on p.673 of its Opinion:

> "An examination of the record reveals no evidence that Shaughnessy or any other employee of Tantzen was ever upon actual, as distinguished from statutorily defined, navigable waters of the United States (hereinafter sometimes called actual water)."

Manifestly, Shaughnessy was, if anything, a land based employee, and not a person whose principal duties were performed on navigable waters as that term was understood before 1972. FUSCO v. PERINI NORTH RIVER ASSOC. p. 669 (A21). The Circuit Court in addressing itself to the question of whether Shaughnessy was the type of land based employee whom Congress sought to cover by virtue of the 1972 Amendment went on to say on p.674:

> "The Committees were explicit in their intention to exclude from LHWCA liability any employer who had no employees on actual water:
>
> Likewise the Committee has no intention of extending coverage under the Act to individuals who are not employed by a person who is an employer, i.e., a person at least some of whose employees are engaged, in whole or in part, in some form of maritime employment. Thus, an individual employed by a person none of whose employees work, in whole or in part, on navigable waters, is not covered even if injured on a pier adjoining navigable waters." S.Rep. 13; H.R.Rep. 11.

The Court below in denying coverage under the Act in Tantzen was merely following the expressed intention of Congress to impose specific limitations upon coverage of the inland or land based employees added by the Shoreward Extension of the 1972 Amendments: (Caputo/Blundo p.266 (supra))

With regard to employees such as the respondents herein who worked on navigable waters on a daily basis and who would have been covered prior to the 1972 Amendments, as defined by this Court in Caputo/Blundo p.273 (supra), the intention of Congress

was to expand rather than limit coverage, viz:

> "Both the text and the history demonstrate a desire to provide continuous coverage throughout their employment to these *amphibious* workers who, without the 1972 Amendments, would be covered only for part of their activity." (Emphasis Added)

While, undeniably, the shifting of longshoring operations onto land was a primary concern of Congress when it enacted the 1972 Amendments to the Act, (Petitioners Brief p. 18) it was never the intention of Congress to extend coverage to a newly added inland or land based worker who, regardless of his occupational title, is employed by a person none of whose employees work on actual navigable waters.

The decisions of the Second Circuit, in the case at bar and in Tantzen, are entirely consistent with Congressional intent and purpose, and serve to eliminate

confusion and uncertainty in the basic administration of the Act.

CONCLUSION

FOR THE FOREGOING REASONS, THE ISSUANCE OF A WRIT OF CERTIORARI SHOULD BE DENIED.

Respectfully submitted,

EPSTEIN & EPSTEIN
Attorneys for Respondent
Ronald Fusco
450 Seventh Avenue
New York, N.Y. 10001
(212) 868-3050

BERNARD S. EPSTEIN,
of counsel